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Issue date: 19Dec2001

CASE NO.: 2000-LHC-2171

OWCP NO.: 4-034390

IN THE MATTER OF

**PRENTICE NEESE
CLAIMANT**

VS.

**INTERNATIONAL MARINE & INDUSTRIAL SERVICES, INC.
EMPLOYER**

**LEGION INSURANCE COMPANY
CARRIER**

APPEARANCES:

Hank B. Zuber, III, Esq.
For Claimant

Traci M. Castille, Esq.
For Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Prentice Neese (Claimant) against International Marine & Industrial Services, Inc. (Employer) and Legion Insurance Company (Carrier). The formal hearing was conducted at Metairie, Louisiana on August 2, 2001. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and

made oral and written arguments.¹ The following exhibits were received into evidence: Joint Exhibit 1-2, Claimant's Exhibits 1-3, 5-30 and Employer's Exhibits 1-29. This decision is based on the entire record.²

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Date of alleged injury is July 24, 1998 (It is agreed that Claimant fell at work on that date, injuring his elbow and requiring elbow stitches. Any other injury is disputed);
2. Injury in the course and scope of employment is disputed;
3. An employer/employee relationship existed at the time of the alleged injury;
4. The District Director gave Employer formal notice of injury on January 26, 1999;
5. Notice of Controversion was filed on March 12, 1999 and November 9, 1999;
6. An informal conference was held on October 15, 1999;
7. Average weekly wage at the time of the alleged injury is disputed;
8. Temporary total disability is disputed;
9. No benefits have been paid to Claimant;

¹The parties were granted time post hearing to file briefs. This time was extended up to and through September 22, 2000.

² The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

10. Medical benefits have been paid;
11. Permanent disability is disputed; and
12. Date of maximum medical improvement was July 15, 1999.³

Unresolved Issues

The unresolved issues in this case are:

1. Causation and fact of injury;
2. Section 912, untimely notice and the statute of limitations;
3. Average weekly wage;
4. Suitable employment and wage earning capacity;
5. Subsequent intervening accident;
6. Section 908(f);
7. Section 907, unauthorized medicals;
8. Untimely filing of LS-207;
9. Interest and penalties pursuant to Section 914; and
10. Section 930 fine.

Statement of the Evidence

Testimonial and Non Medical Evidence

Claimant

On July 24, 1998 Claimant was working for Employer in Maryland as a fitter/welder on a repair ship when he was injured.⁴ He fell off of a temporary walkway inside the ship and landed on his legs, back and arm. He notified his supervisor, Joseph Pol, and went to the hospital, where his lacerated elbow was stitched. At this time, Claimant testified he complained of an elbow injury, not a back injury.⁵ The hospital released Claimant to return to work in two days. Instead of returning to work, Claimant drove back to his home in Mississippi and talked with Dennis Pierce, a

³See Claimant's Exhibit 7.

⁴See Claimant's Exhibit 11, Employer's Exhibit 27, Claimant's deposition dated July 21, 2000.

⁵However, during Claimant's deposition, he stated he reported back pain while in the ER.

manager, in Employer's main office.⁶ Claimant quit and asked about his last paycheck.⁷

Following his July 1998 accident, Claimant sought medical treatment in December 1998 from Dr. McCloskey.⁸ In January 1999, Dr. McCloskey performed surgery. Claimant never obtained Employer's approval for this surgery. After a few follow-up visits, Claimant stopped going to Dr. McCloskey because of difficulty with scheduling appointments.⁹ In February 1999 and April 1999, Claimant was in two car accidents and injured his back.¹⁰ Claimant admitted he had a substance abuse problem prior to the July 1998 accident and continues to have such a problem. He testified he often went to emergency rooms and reported false symptoms, including back pain, just to obtain pain medication from various doctors.

Claimant testified he did not make any real effort to search for a job following his July 1998 accident and has never filed for unemployment compensation. As Claimant liked to chase "shut downs" through the Gulf Coast, his work history was very sporadic. Following his July 1998 injury, Claimant was a welder at Friede Goldman for one month, a welder for a Mississippi fence company, and a laborer for a framing company that built houses. Claimant testified he had difficulty performing each job because of his back pain. Claimant stated he currently experiences leg pain.

⁶Claimant stated in his deposition that he reported back pain to Joseph Pol and attempted to work before returning to Mississippi.

⁷Claimant stated in his deposition that he specifically told Mr. Pierce about his leg and back pain.

⁸Claimant stated in his deposition that he was refused further medical treatment from Employer for his legs and back. Therefore he went to Singing River emergency room a few times, prior to being examined by Dr. McCloskey.

⁹However, in Claimant's deposition, he stated he stopped going to Dr. McCloskey because he could not afford to pay his bills and was denied further treatment.

¹⁰Claimant received \$31,000 from his insurance company as a result of his accident. Claimant reported injuries of his legs, back, bones, and wrist. *See* Employer's Exhibit 13.

Michael Lee Pol

Michael Lee Pol testified he is the owner of International Marine. This company employs a transient workforce to fulfill contracts for the sandblasting and painting of vessels. Mr. Pol explained that Claimant's personnel file was lost due to Hurricane Georges.¹¹ Joseph Pol, Claimant's supervisor, notified the witness a few days after the July 24, 1998 accident concerning Claimant's lacerated elbow. Claimant never told Mr. Pol that he had injured his back. Mr. Pol was first made aware of Claimant's claim for a back injury in January 1999 when Dr. McCloskey sent Employer a bill for services.

Joseph McGill Pol

Joseph McGill Pol testified he began working for Employer in July 1998 as a site coordinator. Mr. Pol was in charge of payroll and was also the employee to whom injured workers reported accidents. He was in Baltimore with Claimant and the other men during the job on which Claimant was injured. He received notice on July 24, 1998 that Claimant had injured his elbow while working. Mr. Pol subsequently took Claimant to the hospital and returned him to the hotel. While at the hospital, Claimant never complained to any doctor that he had injured anything other than his elbow.

Claimant never showed Mr. Pol his back or legs and he never complained to him about any injury other than his elbow. Mr. Pol faxed the appropriate documentation regarding Claimant's injury, including the hospital report, to Employer's office. He also reported the elbow injury to Dennis Pierce, a manager for Employer. Claimant received advances from Mr. Pol while working on the Baltimore job. Claimant earned approximately \$19 per hour, which included per diem. The cost of the hotel room, living expenses, as well as the advances, were deducted from Claimant's pay.

George Leatherbury Lewis, Jr.

George Leatherbury Lewis, Jr. testified he is presently employed by Friede Goldman as a project superintendent. One of his duties is the hiring of new employees. Mr. Lewis often re-hired Claimant and believed he worked on and off for

¹¹See Claimant's Exhibit 10.

Friede Goldman. In August 1998, Claimant was employed by Friede Goldman as a first class fitter, which was classified as a heavy labor position. Mr. Lewis stated Claimant was a good welder and performed his job well, when he chose to come to work. He explained that Claimant often quit without notice. In fact, Mr. Lewis noted, in a change of status form dated September 1998, that Claimant was not to be re-hired until he was treated for his drug and alcohol problem.¹² Claimant never reported to Mr. Lewis that he was unable to perform his duties because of back pain.

Dennis E. Pierce

Dennis E. Pierce testified he owns National Service Corporation, a construction company. In July 1998, Mr. Pierce worked for Employer in the sales department. One of his duties included forwarding requested advances to employees on the Baltimore job. Mr. Pierce forwarded such advances to Claimant. During the Baltimore job, Claimant worked five days. After deducting the advances from Claimant's pay, Mr. Pierce concluded that Claimant was not owed any salary upon completion of the Baltimore job.

On July 24, 1998, Mr. Pierce received notice from Joseph Pol concerning Claimant's elbow injury. They discussed Claimant's elbow injury as well as his subsequent treatment. Mr. Pierce reported Claimant's elbow injury to the appropriate staff member responsible for workers' compensation claims. Claimant also called Mr. Pierce to discuss his payroll status. Claimant never requested medical treatment for his back or authorization for medical treatment. In January 1999, Mr. Pierce was first made aware of Claimant's claim for a back injury when he received a phone call from Dr. McCloskey's office requesting payment for services.

James Donald Goldman

James Donald Goldman testified he worked with Claimant for Employer during the Baltimore job in July 1998. Mr. Goldman was hired as a structural welder. While he was welding on July 24, 1998, Claimant approached him and stated that he had fallen. Mr. Goldman observed a bruise on Claimant's back and gashes on his legs and arm. Claimant complained of back pain. Mr. Goldman assisted Claimant to the

¹²See Employer's Exhibit 14 and Claimant's Exhibit 19.

superintendent's office, where Claimant was treated with the first aid kit.¹³ Mr. Goldman subsequently returned to welding. At the end of the shift, he and Claimant returned to the hotel.

Nancy T. Favaloro

Nancy T. Favaloro testified she is a vocational rehabilitation counselor, and was accepted as an expert in her field. Ms. Favaloro interviewed Claimant on March 20, 2001 and prepared her report, dated April 4, 2001.¹⁴ She reviewed various materials and administered numerous tests. Claimant stated he continued working following his July 1998 injury, until one week prior to his interview with Ms. Favaloro. According to the medical records, Dr. McCloskey eventually released Claimant to work within a light to medium classification. Considering Claimant's educational background, prior work history and medical history, Ms. Favaloro believed Claimant was employable.

Ms. Favaloro conducted a labor market survey in Claimant's area of residence and identified various jobs within Claimant's restrictions. She contacted these potential employers and made them aware of Claimant's specific physical and educational background. It was her opinion that Claimant was qualified to perform all of the 9 identified positions.¹⁵ The wages ranged from \$5.15 to \$9 per hour. During his interview, Claimant informed Ms. Favaloro that he was going to contact an individual for a job building houses.

Robert E. Walker, Jr.

Robert E. Walker, Jr. testified he was a vocational rehabilitation counselor and was accepted as an expert in his field. He was retained by Claimant's counsel to evaluate Claimant's employability and ability to earn wages, and to comment on Ms. Favaloro's report. Mr. Walker was not hired to identify possible employment for Claimant. It was Mr. Walker's opinion that Claimant was employable in minimum wage jobs.

¹³The superintendent was employed by Baltimore Marine, not by Employer.

¹⁴See Employer's Exhibit 16, Ms. Favaloro's report.

¹⁵Her report detailed Claimant's duties for each position.

After reviewing Ms. Favaloro's report, Mr. Walker believed suitable alternative employment was not found because Ms. Favaloro's report did not identify the name, address or telephone number of each prospective employer. Additionally, Ms. Favaloro did not notify Claimant as to these available jobs.

Exhibits

Claimant's Exhibit 22 and Employer's Exhibit 7 are the records from Baltimore Marine. From July 20, 1998 through July 24, 1998, Claimant worked 40 regular hours and earned \$25 per hour.

Claimant's Exhibit 19 and Employer's Exhibit 14 is Claimant's personnel file while employed at Friede Goldman Offshore (Ham Marine). Claimant worked for Friede Goldman on and off from 1994 through 1998, including post-accident in August 1998. Claimant's Exhibit 21 and Employer's Exhibit 14 is Friede Goldman's wage records.

Claimant's Exhibit 20 and Employer's Exhibit 15 is Claimant's personnel file from Gulf Coast Fence Company. Claimant worked as an independent contractor for the week of September 18, 1998, September 25, 1998 and March 19, 1999.

Claimant's Exhibit 1-3 and Employer's Exhibits 1-6 and 11 are various Longshore forms. Claimant's Exhibits 12-14 and Employer's Exhibits 12-13 are various documents relating to Claimant's April 2, 1999 automobile accident. Claimant's Exhibit 18 and Employer's Exhibit 8 is Claimant's social security earnings, dating from 1990 through 1998. Claimant's Exhibits 24-25 and Employer's Exhibits 9-10 are Claimant/Employer's responses to interrogatories and Claimant/Employer's responses to requests for admissions and production.

Medical Evidence

Singing River Hospital

Employer's Exhibit 1 is the medical records from Singing River Hospital, dating from 1969 through 2001. In 1995, Claimant fell 17-20 feet from a mobile home and landed on his back. He complained of back pain and was diagnosed with a low back

strain.¹⁶ In 1997, Claimant was in two motor vehicle accidents. After both accidents, he complained of back pain and was diagnosed with low back strain. An x-ray taken following the first accident showed L5-S1 disc narrowing. In January 1999, Claimant underwent decompressive hemilaminotomies L4-5 and L5-S1, right with discectomy L4-5 right, performed by Dr. McCloskey. From January 1999 through November 1999, Claimant was admitted to the ER with complaints of back pain and treated with various prescription medication. Claimant was in a motor vehicle accident in April 1999. Tests performed showed Claimant to have a normal lumbar spine, with no acute trauma. In November 1999, Claimant stated he was scheduled for additional back surgery, but had never met the doctor who was to perform this operation.

Lakewood Medical Center

Joint Exhibit 2 is the Lakewood Medical Center records. On March 18, 1998, Claimant fell 18 feet and landed on his feet and back. He was diagnosed with lumbosacral strain.

Dr. Dewitt Fortenberry

Claimant's Exhibit 15 and Employer's Exhibit 28 is the deposition of Dr. Dewitt Charles Fortenberry, taken on April 12, 2001. Dr. Fortenberry is an emergency room physician, employed at Franklin Square Hospital in Baltimore, Maryland. He was an attending physician in July 1998 and treated Claimant in the ER following his work-accident. Claimant reported falling 8 feet onto a metal pile, which resulted in an elbow laceration. Claimant, at no time, reported back pain. Dr. Fortenberry and a medical resident sutured Claimant's elbow. Claimant was diagnosed with a simple laceration of the left elbow and released to return to normal work on July 26, 1998.¹⁷

¹⁶At trial, Claimant corrected this false history. He stated that a family member actually threw him into the side of the trailer, buckling the insulation on the outside of the trailer.

¹⁷See Claimant's Exhibit 29 and Employer's Exhibit 18, the records from Franklin Square Hospital.

Laird Hospital

Employer's Exhibit 19 is the medical records from Laird Hospital. Claimant was treated on December 6, 1998, January 29-30, 2000, July 12, 2000 and August 22, 2000. Claimant complained of back pain and was treated with prescription medications. The records stated that Claimant reported falling on June 17, 1998. Likewise, it was noted that Claimant said he had back surgery in April and June 1999, as well as a scheduled surgery in July 2000.

Dr. John McCloskey

Claimant's Exhibit 5 and Employer's Exhibit 29 is the deposition of Dr. John McCloskey, taken on August 11, 2000.¹⁸ He was tendered as an expert in the field of neurological and spinal surgery. Dr. McCloskey treated Claimant from December 10, 1998 through February 6, 1999. On October 15, 1998, prior to Claimant's initial examination, a New Patient referral sheet was completed. When asked about his back problem, Claimant stated his back condition was not a worker's compensation injury and this pain had persisted for nine months.

During Claimant's initial examination in December 1998, he complained of low back pain, bilateral leg pain, shoulder blade and left arm pain. He related all of his symptoms to his July 1998 work-injury. He reported falling onto his back and then being hospitalized. Dr. McCloskey performed a physical examination and obtained an MRI of Claimant's spine. The results showed tenderness and stiffness in Claimant's low back, as well as a disc herniation at L-4 and a small disc bulge at L-5. He treated Claimant with various medications.¹⁹

On January 15, 1999, Dr. McCloskey performed a lumbar laminectomy on Claimant's back. Following the surgery, Claimant reported that his back pain had decreased. On February 6, 1999, Claimant was taken to the emergency room by the Sheriff's department, following an automobile accident. He complained of back and hip pain. Dr. McCloskey diagnosed Claimant with post lumbar laminectomy

¹⁸See Claimant's Exhibit 30 and Employer's Exhibit 22, Dr. McCloskey's medical records.

¹⁹Dr. McCloskey's office notes stated that he would not continue to refill Claimant's narcotic prescriptions because Claimant had a substance abuse problem.

syndrome. On March 18, 1999, Dr. McCloskey released Claimant to light duty work with temporary restrictions, which included alternating between sitting and standing every 15 minutes and no lifting greater than 15-20 pounds.²⁰ Dr. McCloskey later released Claimant to light and medium duty work. He testified he never refused to treat Claimant because of unpaid medical bills.

During the initial examination in December 1998, Claimant never reported any prior back injuries. However, after reviewing Claimant's medical records from Singing River Hospital during his deposition, Dr. McCloskey became aware of Claimant's complaints of back pain in June 1995, June 1997, December 1997, March 1999, and August 1999. Dr. McCloskey believed the June 1995 fall of 17 feet from a mobile home, as well as the June 1997 and December 1997 automobile accidents were consistent with Claimant's subsequent disc rupture.

Dr. McCloskey opined that Claimant's disc herniation was caused by his July 1998 work-injury. However, Dr. McCloskey admitted that his opinion was based solely on Claimant's subjective history.²¹ Dr. McCloskey was unable to opine with regards to MMI because Claimant never returned to his office after February 6, 1999.²²

Ocean Springs Hospital

Employer's Exhibit 20 is the medical records from Ocean Springs Hospital. Claimant was admitted to the Emergency Room on March 30, 1999. Claimant complained of back pain and chronic drainage from both ears. The records noted that Claimant reported a confusing medical history. He first stated he had been recently treated by Dr. Laseter, then later retracted his statement. Likewise, Claimant denied that he had recently received medical attention until confronted with records from Singing River Hospital which noted he had been treated the week before. The ER doctors refused to prescribe narcotic medication for Claimant.

²⁰These temporary restrictions were effective until July 31, 1999.

²¹See Claimant's Exhibit 8.

²²See Claimant's Exhibit 7, in a letter dated October 2, 2000, Dr. McCloskey opined that Claimant reached MMI six months following his surgery, on July 15, 1999. This was a typical recovery time for someone who underwent surgery like Claimant.

Mississippi Coast Orthopedic Group

Employer's Exhibit 23 is the records from Mississippi Coast Orthopedic Group. Claimant was treated from April 2, 1999 through June 3, 1999 for a left wrist injury. During this time Claimant was treated with narcotic medication.

Dr. Victor Bazzone

Employer's Exhibit 17 is the report of Dr. Victor Bazzone, dated July 23, 2001. Dr. Bazzone, a neurosurgeon, never physically examined Claimant. Rather, he was hired by Employer to write a report that dealt with the likeliness that Claimant's July 1998 injury caused his subsequent disc herniation. Dr. Bazzone reviewed all of Claimant's medical records and the depositions of Claimant and Drs. Fortenberry and McCloskey. He opined, based upon a reasonable degree of medical probability, that it was impossible to determine with a reasonable degree of medical certainty when Claimant suffered a herniated disc, which was subsequently removed by Dr. McCloskey in January 1999.

Dr. Bazzone explained that Claimant's past medical history could possibly have caused Claimant's ruptured disc. In 1995, Claimant fell 17-20 feet and landed on his back.²³ In June 1997, Claimant was in an automobile accident with resulting back pain. X-rays showed a narrowed L5-S1 disc space which indicated a chronic process of disc degeneration, the cause of which was probably Claimant's 1995 accident. In December 1997, Claimant was in another automobile accident with resulting lumbosacral and neck pain.

Furthermore, Dr. Bazzone believed the medical records following the July 1998 accident did not support the finding that this accident caused Claimant's herniated disc. The Franklin Square Hospital records never mentioned back pain, only treatment for an elbow laceration. Additionally, Dr. Bazzone believed it very unlikely that Claimant could continue working as a welder following the July 1998 accident with an acutely herniated disc at L4-5.

²³At trial, Claimant testified he was thrown into the side of the mobile home, causing the insulation to buckle.

Miscellaneous

Claimant's Exhibits 6 and 9 and Employer's Exhibits 24-26 is Employer's correspondence with Drs. Laseter and McCloskey, University of South Alabama Hospital, East Jefferson General Hospital, and Claimant's attorney.

Findings of Fact and Law

Section 12 Timely Notice

Section 12 (a) of the Act provides that "notice of injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of a relationship between the injury or death and the employment, except that in the case of occupational disease . . . notice shall be given within one year" *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Sheek v. General Dynamics Corp.*, 18 BRBS 1 (1985), *on recon.*, 18 BRBS 151 (1986). The judge must determine the date on which the claimant became aware of, or should have become aware of, the relationship between the injury, the employment and the disability. *Martin v. Kaiser Co.*, 24 BRBS 112 (1990). It is the claimant's burden to establish timely notice.

Prior case law has applied the occupational disease provisions of the Act to work related injuries that are potentially hazardous to an entire class of employees. *See Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 23 BRBS 13 (2nd Cir. 1989). In this instance, there is no evidence that Claimant's condition is peculiar to his particular line of work or that an entire class of employees suffer the same problem. Likewise, there is no precedent that "occupational disease was meant to refer to a traumatic physical impact or reoccurring activity." *See LeBlanc v. Cooper T/Smith Stevedoring*, 130 F.3d 157 (5th Cir. 1997). In the absence of evidence to the contrary, I find Claimant's injury, if any, to be of a traumatic nature and requiring notice to his employer within 30 days of awareness.

On July 24, 1998 Claimant was working for Employer in Baltimore, Maryland on a repair ship as a fitter/welder when he was injured. He fell off of a temporary walkway inside the ship. Claimant alleges that, as a result of this fall, he injured his

back. Mr. Goldman testified that fitting and welding was the type of work he and Claimant were employed to perform for Employer.

It is undisputed that, as a result of the accident on July 24, 1998, Claimant lacerated his elbow. Employer took Claimant to the hospital where his elbow was sutured and medical care was provided. There is no dispute as to notice regarding Claimant's elbow injury. The dispute between the parties concerns Claimant's alleged back injury as a result of this accident and the notice he provided Employer with regards to this injury.

Claimant testified that he was aware of his back injury on the day of his accident, July 24, 1998. Claimant's co-worker, James Goldman, testified that Claimant complained of back pain to him immediately following the July 24, 1998 accident. Claimant testified that he reported back pain to the treating doctors at Franklin Square Hospital while his elbow was sutured. He also testified that he was in excruciating back pain during the drive back to Mississippi from Maryland, which occurred a few days after his accident. Consequently, I find that Claimant was aware of his back injury following his work-accident on July 24, 1998. The question remains as to when Claimant notified Employer of this injury.

At trial, Claimant testified that he reported this back injury verbally to Dennis Pierce and Joseph Pol, two of Employer's representatives, within days of the July 24, 1998 accident. Both of these men testified that Claimant never reported any complaints of back pain to them. During his deposition, Claimant also testified that he verbally reported back pain as a result of his accident to the hospital staff at Franklin Square Hospital when his elbow was sutured. However, during trial, Claimant changed his testimony and stated he never reported back pain to the hospital staff, and the hospital records have no record of a back complaint. Joseph Pol testified that he took Claimant to the hospital on July 24, 1998, and stayed within earshot of him while his elbow was being sutured and Claimant at no time reported back pain.

Michael Pol, the owner of International Marine, and Dennis Pierce, a former manager for Employer, both testified that Employer first became aware of Claimant's alleged back injury when they were contacted by Dr. McCloskey's office for payment of services following Claimant's January 15, 1999 surgery. Dr. McCloskey's records indicated that his office staff first telephoned Employer on January 19, 1999 to inquire

about payment. In fact, both parties stipulated in Joint Exhibit 1 that Employer was advised of injury on January 26, 1999.

Determining when Employer was aware of Claimant's back injury is a question of credibility among the witnesses because Claimant's testimony is contrary to that of Michael Pol, Joseph Pol, and Dennis Pierce. After reviewing the record, I find Claimant's testimony to not be credible, and therefore afford more weight to the testimonies of Michael Pol, Joseph Pol and Dennis Pierce, which are also substantiated by the Franklin Square Hospital ER records. Consequently, I find Employer was not made aware of Claimant's alleged back injury until January 1999, following Claimant's surgery, when Dr. McCloskey's office contacted Employer for payment.

At trial, Claimant admitted to being a substance abuser and being untruthful to hospital staff and doctors about pain complaints in order to obtain narcotics. Claimant also reported a false history to the Singing River Hospital ER in June 1995, to "protect" a family member. Claimant reported to the hospital staff in June 1995 that he had fallen 17-20 feet off of his mobile home, landed on his back and injured himself. However, at trial, Claimant testified that instead of falling, he was thrown into the side of a mobile home, caused the insulation to buckle and therefore injured his back.

Claimant's deposition testimony and trial testimony are also fraught with inconsistencies. For instance, Claimant testified at deposition that he stopped treatment with Dr. McCloskey because he could not afford to pay his medical bills and as a result, Dr. McCloskey refused to provide further treatment. At trial, Claimant testified that the "real" reason he stopped treatment was not because of the unpaid bills, but because he had difficulty scheduling appointments. However, Dr. McCloskey's records indicate that Claimant probably discontinued treatment because Dr. McCloskey refused to continue prescribing narcotic medication, for Dr. McCloskey testified that he would never refuse a patient treatment for unpaid medical bills. Another example of Claimant's inconsistent testimony was when Claimant changed his deposition and trial testimony regarding pain complaints made to the staff at Franklin Square Hospital following the July 24, 1998 accident. Claimant also testified he explained the suturing process to the doctors at Franklin Square Hospital when his elbow was sutured. However, the attending physician of the hospital, Dr. Fortenberry, testified that while he could not specifically remember Claimant, he believed it highly unlikely that a trained physician would need any type of coaching from Claimant with

regards to suturing. Also, Claimant testified he went to Singing River Hospital between July 24, 1998 and December 10, 1998. However, Singing River Hospital has no record of treating Claimant during this time period.

In sum, according to Claimant he was aware of his back injury on July 24, 1998; and while Claimant testified that he notified Employer of this alleged injury within 30 days of the accident, the record does not support such a finding, and I find that Employer was not made aware of Claimant's back injury until January 1999, following Claimant's January 15, 1999 back surgery. As this is more than 30 days from Claimant's awareness of an alleged back injury, I find Claimant did not give Employer timely notice of such an injury.

Section 12(d) of the Act will excuse the claimant's untimely notice to employer, if employer was not prejudiced by the failure to provide such notice. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989); *Sheek v. General Dynamics Corp.*, 18 BRBS 151 (1986). Prejudice is established when the employer demonstrates that, due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. *Strachan Shipping Co. v. Davis*, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), *rev'g* 2 BRBS 272 (1975); *White v. Sealand Terminal Corp.*, 13 BRBS 1021 (1981). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that an employer has been given sufficient notice under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Accordingly, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). A generalized claim of not being able to investigate while the claim is still fresh is insufficient to prove prejudice. *See Ito Corporation v. Director, OWCP*, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

Employer here argues that it was prejudiced by Claimant's untimely notice because it was unable to investigate the extent of Claimant's back injury or provide medical services. I agree. Employer was not notified of Claimant's alleged back injury on July 24, 1998. Rather, Employer was notified of Claimant's alleged injury after back surgery had been performed in January 1999. Because of Claimant's untimely notice, Employer was denied the opportunity to obtain a second opinion

regarding Claimant's condition and possible causation, as well as a pre-surgery IME regarding possible alternative treatments. The only medical opinion Employer could hope to obtain would be post-surgery, six months after the alleged injury.

If Claimant had timely notified Employer of his back injury, Employer could have provided medical care, or at least had the opportunity to provide such care. Employer could also have investigated Claimant's condition to possibly provide evidence necessary to sever the causal connection between the July 24, 1998 accident and the alleged back injury. However, because Employer was not notified of Claimant's back injury until after Claimant's surgery, it was denied the opportunity for both investigation and medical care. As Employer has demonstrated prejudice, I find that Claimant is barred from compensation for untimeliness. Consequently, the issues of Nature and Extent, as well as Section 8(f) relief and Section 14(e) penalties are moot.

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The parties stipulated in Joint Exhibit 1 that Claimant fell at work on July 24, 1998 and injured his elbow. The issue is whether Claimant also injured his back as a result of the July 1998 work-accident.

On July 24, 1998 Claimant fell while working on a repair ship. He notified his supervisor, Joseph Pol, of his elbow injury. Claimant was taken to Franklin Square Hospital, where his elbow was sutured. Claimant, in his deposition, stated he reported back pain to the ER. However, at trial, Claimant changed his testimony and stated he never complained of back pain. Joseph Pol accompanied Claimant to the hospital and was within earshot while Claimant was treated. Claimant never mentioned back pain to the hospital staff or Mr. Pol. Mr. Pol's testimony is supported by the testimony of Dr. Fortenberry, the attending physician at Franklin Square Hospital, and by the hospital records. There is no indication that Claimant ever reported back pain while being treated for his lacerated elbow.

Following the accident, Claimant testified he immediately returned to Mississippi. However, at his deposition, Claimant testified he first attempted to work and then drove back to Mississippi. Claimant testified he reported back pain to Dennis Pierce and requested treatment for back pain. Mr. Pierce denied that Claimant ever reported a back injury or requested treatment.

Claimant, thereafter, testified he went to Singing River Hospital for medical treatment for his back pain prior to his examination with Dr. McCloskey. However, the Singing River Hospital records have no record of Claimant being admitted and treated between July 24, 1998 and December 1, 1998.

On October 15, 1998, a new patient referral sheet was completed by Dr. McCloskey's office for Claimant. Claimant stated his back condition had persisted for nine months, placing the onset of his symptoms in February 1998, and denied it was work-related.

Dr. McCloskey treated Claimant from December 10, 1998 through February 6, 1999. Claimant did not disclose his prior three back injuries of June 1995, June 1997, and December 1997 to Dr. McCloskey. Dr. McCloskey diagnosed Claimant with a disc herniation at L4-5. Surgery was performed on January 15, 1999 and Claimant was treated with narcotic medication. Dr. McCloskey opined that the July 24, 1998 accident could have caused Claimant's herniated disc. However, he admitted that this opinion was based solely on Claimant's subjective history. After learning of Claimant's prior back injuries, Dr. McCloskey concluded that those injuries were also consistent with Claimant's subsequent herniated disc.

I find that the only evidence in the record supporting Claimant's contention that he injured his back on July 24, 1998 is Claimant's non-credible testimony and the testimony of Dr. McCloskey, which was based solely on Claimant's self serving history. No objective evidence exists to support the finding that Claimant suffered a harm to his back as a result of the July 24, 1998 accident. As such, I find Claimant has failed to establish his prima facie case of causation, regarding his alleged back injury.

However, even assuming that Claimant had established causation, substantial evidence exists to rebut the presumption that Claimant's back condition is causally related to his employment and the evidence as a whole does not support a finding of causation.

First, none of the medical records contain any report of back pain made by Claimant from July 24, 1998 through December 10, 1998. The medical records, however, do document Claimant's prior back injuries of June 1995, June 1997 and December 1997. Claimant admitted he often lied to doctors about his pain symptoms to obtain narcotics.

Secondly, Dr. McCloskey's records indicate that Claimant stated his onset of pain as nine months prior to October 1998, placing the onset of Claimant's back pain in February 1998, not July 1998. Additionally, Dr. McCloskey's opinion as to causation was based solely on Claimant's subjective history.

Thirdly, following Claimant's alleged back injury, he continued working in heavy labor positions from August 1998 through March 1999. In August 1998, less than one month post-accident, Claimant worked for Friede Goldman as a fitter, for an entire month. George Lewis testified that he hired Claimant and Claimant never once complained that he was unable to perform his duties because of back pain. Claimant subsequently quit this position. There was no evidence to suggest that Claimant stopped working because of back pain. Claimant next worked as an independent contractor at Gulf Coast Fence Company for two weeks in September 1998 and one week in March 1999. Again, there was no evidence that Claimant stopped working because of back problems. Claimant also testified he worked post-injury as a laborer at a framing company that built houses.

Finally, Dr. Bazzone, a board certified neurosurgeon, opined after reviewing all of Claimant's medical records and the depositions of Claimant and Dr. Fortenberry and McCloskey that it was impossible to determine with a reasonable degree of medical certainty when Claimant suffered a herniated disc. He stated Claimant's past medical history, including the injuries sustained in 1995 and 1997, could have caused Claimant's ruptured disc. He also thought it very unlikely that Claimant could have continued working post-accident with a herniated disc.

In sum, I find Employer's evidence to be both substantial and countervailing, sufficient to rebut Claimant's Section 20(a) presumption. When weighed as a whole, the evidence does not support a finding of causation as to Claimant's back condition. As a result, because Claimant has not established causation, his claim for Section 7 medical benefits must be denied, except as to any medical bills related to his lacerated elbow, all of which I understand to be paid.

ORDER

It is hereby **ORDERED** that Claimant's claim for benefits under the Act are **DENIED**.

It is hereby **ORDERED** that Claimant's claim for Section 7 medical benefits under the Act, as relate to Claimant's back surgery, are **DENIED**.

So **ORDERED** this 19th day of December, 2001, at Metairie, Louisiana.

A

C. RICHARD AVERY

Administrative Law Judge

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